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10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14  
15 **SAN FRANCISCO DIVISION**

16 IDEDA ANTOSI, individually and on behalf  
17 of a proposed class,

18 Plaintiffs,

19 v.

20 DOORDASH, INC.,

21 Defendant.

22 Case No.: 21-CV-08096-TSH

23 **DOORDASH, INC.'S NOTICE OF**  
24 **MOTION AND MOTION TO**  
25 **DISMISS; MEMORANDUM OF**  
26 **POINTS AND AUTHORITIES**

27 Judge: Hon. Thomas S. Hixson  
28 Date: January 20, 2022  
Time: 10:00 a.m.  
Location: Courtroom G, 15th Floor  
Complaint Filed: October 15, 2021  
Trial Date: None Set

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**NOTICE OF MOTION AND MOTION TO DISMISS**

**TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on January 20, 2021, at 10:00 a.m., or as soon thereafter as this matter may be heard, in the courtroom of the Honorable Judge Thomas S. Hixson, located in Courtroom G - 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant DoorDash, Inc. will and hereby does move this Court to dismiss Plaintiff's Complaint with prejudice for failure to state a claim.

Plaintiff contends that he received calls on his residential telephone solely attempting to recruit Plaintiff for employment. Plaintiff, as a result, brings two claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA") and seeks to represent two putative classes. However, the claims Plaintiff brings apply only to the receipt of *marketing* calls. Employment recruitment calls have been routinely held, in this District and across the country, to be non-marketing under the TCPA. Plaintiff thus fails to state a claim as a matter of law and his claims must be dismissed with prejudice.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, all of the pleadings and other documents on file in this case, all other matters of which the Court may take notice and any further argument or evidence that may be received by the Court at the hearing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiff contends that in June of 2021, he received twelve calls to his residential telephone attempting to recruit Plaintiff for a job with DoorDash.<sup>1</sup> Plaintiff claims that these calls were placed despite his allegation that he is on the national do not call list. As a result, Plaintiff brings two claims (on behalf of himself and two putative classes) under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*: (i) a claim under 47 U.S.C. § 227(b)(1)(B) for the receipt of prerecorded calls on his residential telephone and (ii) a claim under 47 U.S.C. § 227(c)(5) for the receipt of prerecorded calls to a number on the national do not call list.

Both claims fail as a matter of law because both claims are limited exclusively to *telemarketing* calls and solicitations. Plaintiff did not receive marketing calls, however. Plaintiff alleges he received solely employment recruitment calls (albeit, as DoorDash contends, having nothing whatsoever to do with DoorDash). Telemarketing calls are calls initiated “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 C.F.R. §§ 64.1200(f)(13), (f)(15). Employment recruitment calls are self-evidently not telemarketing—the purpose is to provide an employment opportunity, not to encourage the purchase, rental or investment in anything. Courts in this District and across the country uniformly agree and have dismissed materially identical TCPA cases as a result. *See, e.g., Reardon v. Uber Techs., Inc.*, 115 F. Supp. 3d 1090, 1096 (N.D. Cal. 2015) (“[T]exts sent to prospective drivers in this case do not promote goods or services and are not advertisements or telemarketing efforts.”); *Friedman v. Torchmark Corp.*, No. 12-CV-2837-IEG BGS, 2013 WL 4102201, at \*5 (S.D. Cal. Aug. 13, 2013) (“[A]n offer of employment is not material advertising the commercial availability . . . of any

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<sup>1</sup> Though Plaintiff’s factual allegations must be accepted as true at this stage, DoorDash must note at the outset that it contends it had nothing whatsoever to do with the calls Plaintiff allegedly received, and firmly believes these calls to have been a scam. Indeed, the calls on their face would not appear to be the work of a legitimate actor. Plaintiff cannot so much as allege that the phone numbers at issue belonged to or are affiliated somehow with DoorDash. Plaintiff has declined to accept a DoorDash declaration attesting to having nothing whatsoever to do with the calls. DoorDash reserves the right to pursue all proper remedies. This is also not the first time this Court has had to evaluate a TCPA suit brought against an entity that had nothing to do with the outreach. *See Rogers v. Postmates Inc.*, No. 19-CV-05619-TSH, 2020 WL 3869191, at \*1 (N.D. Cal. July 9, 2020), *appeal dismissed*, 2021 WL 455321 (9th Cir. Jan. 15, 2021).

property, goods, or services” within the ordinary meaning of those words of the TCPA.”) (internal quotations and citations omitted).

Plaintiff, by his own allegations, received only calls recruiting him for employment. These calls are not telemarketing or solicitations under the TCPA as a matter of law and Plaintiff’s Complaint should be dismissed with prejudice.

### **STATEMENT OF ISSUES TO BE DECIDED**

1. Whether Plaintiff received only non-marketing calls as a matter of law.

2. Whether, as a result of receiving only non-marketing employment recruiting calls, Plaintiff’s claims must be dismissed with prejudice.

### **BACKGROUND**

#### **I. THE COMPLAINT.**

This action arises out of Plaintiff’s alleged receipt of unsolicited prerecorded messages that Plaintiff asserts were from DoorDash. (Dkt. 1.) Plaintiff alleges that, beginning in June of 2021, he received a series of identical prerecorded calls to his residential telephone, which he states is on the national do not call list. (*Id.* ¶¶ 22, 24.) Plaintiff alleges that he received a dozen such calls, all of which attempted to recruit Plaintiff for employment with DoorDash. (*Id.* ¶¶ 25-36.) Plaintiff alleges that after the twelfth call, he “played along” with the prerecorded message to determine “who was behind the calls.” (*Id.* ¶ 37.) During this interaction, Plaintiff contends that the following occurred:

[A] computerized avatar . . . explained Defendant’s employment benefits and asked a series of questions to see if Plaintiff qualified for employment as a driver. Specifically, the avatar explained DoorDash’s business model and stated that drivers could earn “up to \$18 per hour.” Additionally, the avatar boasted that DoorDash drivers were paid daily, had flexibility in choosing their work hours, and got to “be [their] own boss.” After answering a few basic questions, Plaintiff was told that he was “prequalified” for a position as a DoorDash driver . . . .

(*Id.*) Plaintiff thus makes abundantly clear that the calls at issue in this case solely concern employment, and not the advertisement or encouragement of purchasing any products or services.



On the basis of these allegations, Plaintiff brings two claims under the TCPA. Plaintiff brings one claim under 47 U.S.C. § 227(b)(1)(B) for the alleged receipt of unsolicited prerecorded calls to a residential telephone line. And Plaintiff brings one claim under 47 U.S.C. § 227(c)(5) for the alleged receipt of unsolicited calls to a number on the national do not call list in violation of the TCPA's corresponding regulation 47 C.F.R. § 64.1200(c)(2). Plaintiff likewise seeks to represent one class corresponding to each claim. (*See id.* ¶ 40.)

## **DISCUSSION**

### **I. THIS COURT SHOULD DISMISS PLAINTIFF'S COMPLAINT.**

#### **A. Legal Standard.**

To survive a motion to dismiss, a complaint must plead sufficient factual matter, if accepted as true, to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Rogers*, 2020 WL 3869191, at \*2 (Hixson, M.J.)

This Court need only accept allegations pleaded with factual support that plausibly demonstrate an entitlement to relief. *See Iqbal*, 556 U.S. at 678-79; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."); *Barbizon School v. Sentinel Ins. Co.*, No. 20-08578-TSH, 2021 WL 5758890, at \*5 (N.D. Cal. Dec. 3, 2021). This Court need not accept as true "naked assertion[s] devoid of further factual enhancement," conclusory allegations, legal conclusions, unreasonable inferences or internally inconsistent allegations. *Iqbal*, 556 U.S. at 678-79 (internal quotations and citation omitted); *Valley Surgical Ctr. v. Cty. of Los Angeles*, No.13-02265, 2015 WL 3825310, at \*6 (C.D. Cal. June 18, 2015) ("Although the Court should take the facts as pled in the light most favorable to the plaintiff, it need not accept internally inconsistent facts as true."). The Supreme Court has admonished courts evaluating motions to dismiss, "to draw on [their] judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

**B. Plaintiff's Claims Fail as a Matter of Law Because He Alleges only the Receipt of Employment Recruitment Calls.**

***i. Plaintiff's TCPA claims apply only to telemarketing, advertising and solicitation calls.***

Plaintiff brings two TCPA claims: (i) a claim under 47 U.S.C. § 227(b)(1)(B) for the alleged receipt of unsolicited prerecorded calls to a residential telephone line and (ii) a claim under 47 U.S.C. § 227(c)(5) for the alleged receipt of unsolicited calls to a number on the national do not call list in violation of the TCPA's corresponding regulation 47 C.F.R. § 64.1200(c)(2). Both claims, however, pertain *only* to telemarketing calls.

First, regarding Plaintiff's claim under Section 227(b)(1)(B), this provision states:

It shall be unlawful for any person within the United States . . . —to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, ***or is exempted by rule or order by the Commission under paragraph (2)(B).***

47 U.S.C. § 227(b)(1)(B). Paragraph (2)(B) permits the Federal Communications Commission ("FCC") to "exempt from the requirements of paragraph (1)(B)" non-commercial calls and calls made for a commercial purpose that do not include telemarketing. *Id.* § 227(b)(2)(B).

Pursuant to this authority, the FCC did exactly that, implementing (in relevant part) two exemptions for (i) calls not made for commercial purposes and (ii) calls "made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing." 47 C.F.R. § 64.1200(a)(3); *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1832 (2012) (explaining the FCC's authority under Section 227(b)(2)(B)); *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 560 (2008) ("Section 227(b)(2)(B) authorizes the Commission to exempt noncommercial and certain other classes of calls from the prohibition on prerecorded messages to residences."); *In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*,

7 F.C.C. Rcd. 8752 (1992) (enacting the exemptions); *see also Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 917 (9th Cir. 2012) (noting the FCC has used its delegate authority under Section 227(b)(2)(B) to exempt certain categories of calls, including commercial calls that do not introduce an advertisement or constitute telemarketing); *Friedman*, 2013 WL 4102201, at \*3 (same).<sup>2</sup>

As a result of the FCC’s regulations, calls to residential lines are *exempt* if they are either (i) non-commercial or (ii) are commercial, but do not introduce an advertisement or constitute telemarketing. *See, e.g., Friedman*, 2013 WL 4102201, at \*4; 47 C.F.R. § 64.1200(a)(3).

Second, and as it relates to Plaintiff’s claim under 47 U.S.C. § 227(c)(5), this section permits a private right of action for claims alleging “more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection . . . .” 47 U.S.C. § 227(c)(5). Plaintiff contends that the FCC’s regulation provided at 47 C.F.R. § 64.1200(c)(2) was violated here. (*See* Dkt. 1 ¶ 57.) This regulation provides:

No person or entity shall initiate any **telephone solicitation** to . . .  
 (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government.

47 C.F.R. § 64.1200(c)(2) (emphasis added).

Under this regulation, “[i]nformational, non-solicitation telephone calls to numbers on the do-not-call registry do not violate the TCPA.” *Williams-Diggins v. Republic Servs.*, No. 3:18 CV 2313-JZ, 2019 WL 5394022, at \*1 (N.D. Ohio Apr. 25, 2019); *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-CV-1459-ORL, 2013 WL 6865772, at \*10 (M.D. Fla. Dec. 31, 2013), *aff’d*, 797 F.3d 1302 (11th Cir. 2015) (holding non-solicitation calls are not actionable under the FCC’s regulations at 47 C.F.R. § 64.1200(c)).

In sum, both of Plaintiff’s claims require that he allege the receipt of telemarketing, advertising or solicitation calls. Plaintiff’s Complaint, as detailed below, proves that he received no such calls.

<sup>2</sup> DoorDash notes that while the FCC has altered these exemptions, those alterations have not yet taken effect and (as of the date of this filing) are delayed indefinitely. *See Limits on Exempted Calls Under the Telephone Consumer Protection Act of 1991*, 86 FR 11443-01. They thus have no impact on the calls at issue here.

1                    ***ii. Employment recruitment calls are not advertisements or telemarketing***  
 2                    ***and thus are not actionable under 47 U.S.C. § 227(b)(1)(B).***

3                    Plaintiff concedes he received solely employment-related calls. Plaintiff specifically  
 4 alleges that calls provided that he could sign up to work for DoorDash “get paid fast, and make up  
 5 to \$18 an hour.” (Dkt. 1 ¶ 25.) Plaintiff concedes that the calls pertained solely to job  
 6 recruitment—namely, (i) discussing DoorDash’s<sup>3</sup> employment benefits and (ii) asking questions  
 7 to determine if Plaintiff qualified as a driver. (*Id.* ¶ 37.) The purpose of the calls, as Plaintiff  
 8 alleges, were to identify the benefits of working for DoorDash (including flexibility and rate of  
 9 pay) and, at the conclusion, Plaintiff was told he “prequalified” for a position with DoorDash. (*Id.*)  
 10 There can be no mistaking that both the content and purpose of these calls, as Plaintiff affirmatively  
 11 alleges, was to recruit Plaintiff for employment. These calls are not actionable under the claims  
 12 Plaintiff asserts.

13                    As noted above, 47 U.S.C. § 227(b)(1)(B) exempts non-commercial calls and commercial  
 14 calls that do not introduce an “advertisement” or constitute “telemarketing.” The FCC has  
 15 indicated that non-commercial calls “includes calls conducting research, market surveys, political  
 16 polling or similar activities which do not involve solicitation as defined by our rules.” *In the*  
 17 *Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752,  
 18 8774 (1992). A “solicitation” under the TCPA “means the initiation of a telephone call or message  
 19 for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or  
 20 services.” 47 C.F.R. § 64.1200(f)(15). Calls concerning employment opportunities are not  
 21 commercial calls as they are not solicitations. *See, e.g., Lutz App. Servs., Inc. v. Curry*, 859 F.  
 22 Supp. 180, 181 (E.D. Pa. 1994) (“When, for example, an employer places a ‘help wanted’ ad, no  
 23 one speaks or thinks of it as a property solicitation or an offer of property.”).

24                    Nevertheless, even if employment opportunity calls were considered commercial in nature,  
 25 they would be exempt as commercial calls that do not “include or introduce an advertisement or  
 26 constitute telemarketing.” 47 C.F.R. § 64.1200(a)(3)(iii). The TCPA separately defines

27                    <sup>3</sup> Again, as noted above, DoorDash contends it had nothing whatsoever to do with the calls  
 28 at issue and that Plaintiff was the unfortunate victim of an apparent scam.

advertisement and telemarketing, using materially identical phrasing:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

...

(13) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

47 C.F.R. §§ 64.1200(f)(1), (13). The definitions are substantively similar, and courts evaluating the distinction between the two definitions have noted that “[w]hile the content of the calls controlled whether they were ‘advertisements,’ their purpose controlled whether they were ‘telemarketing.’” *Golan v. Veritas Entm’t, LLC*, 788 F.3d 814, 820 (8th Cir. 2015) (citing 47 C.F.R. § 64.1200(f)(12)). The Ninth Circuit has admonished courts to evaluate TCPA claims, particularly on this very issue, “with a measure of common sense.” *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012).

Job recruitment calls, even if commercial, are neither advertisements nor telemarketing. An instructive analysis was undertaken by Judge Tigar in *Reardon v. Uber*, evaluating whether employment recruitment messages were advertisements or telemarketing under the TCPA.<sup>4</sup> See *Reardon*, 115 F. Supp. 3d at 1093. In *Reardon*, the plaintiffs brought a putative TCPA class action over the receipt of job recruitment text messages. *Id.* at 1094. Judge Tigar readily concluded:

The Court finds that the texts at issue here were more akin to recruiting texts than advertising or telemarketing texts. . . . [T]he texts from Uber seeking to recruit drivers were not attempts to promote a “good” (its application) to those drivers, but instead was an attempt to recruit drivers so that those potential drivers could provide services to riders.

*Id.* at 1097.

<sup>4</sup> The *Reardon* case involved the interpretation of 47 C.F.R. § 64.1200(a)(2), which regulates automated outreach to cellular telephones. Because this analysis turned on the application and interpretation of the terms “advertisement” and “telemarketing,” the *Reardon* analysis is equally applicable here. The only distinction is the outcome of the analysis under Section 64.1200(a)(2) impacts merely the *type* of consent needed for the outreach (written versus non-written consent). The analysis under Plaintiff’s claims, though, impacts *whether* consent is needed at all.

By way of further example, in *Friedman v. Torchmark*, a Southern District of California court evaluated a TCPA claim stemming from prerecorded calls to a residential line in alleged violation of 47 U.S.C. § 227(b)(1)(B). *See, e.g., Friedman*, 2013 WL 4102201, at \*1. The plaintiff contended the call consisted of an invitation to a recruitment webinar to learn to sell the defendant's insurance products. *Id.* The court dismissed the claim, holding "an offer of employment is not 'material advertising the commercial availability . . . of any property, goods, or services' within the ordinary meaning of those words of the TCPA." *Id.* at \*5 (internal citation omitted). The court thus found a recruiting seminar analogous to an offer of employment. *Id.* ("The messages in the instant case inviting Plaintiff to attend a recruiting webinar wherein Plaintiff could learn about Defendant's products to potentially sell them . . . is similar to the offer of employment . . .").

Two Northern District of Illinois cases likewise held that job recruitment calls are neither advertisements nor telemarketing in dismissing TCPA claims. In *Dolemba v. Illinois Farmers Insurance*, the court evaluated a TCPA claim concerning a prerecorded call to become a Farmers agent. *See* No. 15 C 463, 2015 WL 4727331, at \*2 (N.D. Ill. Aug. 10, 2015). The court quickly disregarded the plaintiff's "artful drafting" that the call was for a "business opportunity." *Id.* The court first determined that the call did not introduce an advertisement because it was merely a job recruitment call. *See id.* at \*3-4. The court next determined that the call did not constitute telemarketing because "the call did not explicitly or implicitly encourage him to purchase, or invest in, any property, goods, or services." *Id.* at \*5 (internal quotations omitted); *see also Dolemba v. Illinois Farmers Ins. Co.*, 213 F. Supp. 3d 988, 995 (N.D. Ill. 2016) (dismissing claims relating to residential calls with prejudice). In *Payton v. Kale Realty*, another Northern District of Illinois court determined that job recruitment messages were neither advertising nor telemarketing. *See* 164 F. Supp. 3d 1050, 1062 (N.D. Ill. 2016); *see also id.* at 1063 ("[T]he court finds that the intent of the message is not to encourage an individual to purchase any of Kale's services but rather to inform plaintiffs about an opportunity to become an independent contractor for Kale.").

In *Lutz Appellate Services v. Curry*, an Eastern District of Pennsylvania court evaluated whether a job recruitment fax constituted an advertisement. 859 F. Supp. 180, 181 (E.D. Pa. 1994).



1 The plaintiff argued the fax advertised employment (thus property), but the Court rejected this:

2           A company’s advertisement of available job opportunities within its  
3 ranks is not the advertisement of the commercial availability of  
4 property. . . . When, for example, an employer places a “help  
5 wanted” ad, no one speaks or thinks of it as a property solicitation or  
6 an offer of property. Likewise, when an employer hires an employee,  
7 no one characterizes the hiring as a property sale, exchange or  
8 transaction. Here, the defendants did nothing more than send a “help  
9 wanted” ad on two occasions over the plaintiff’s fax machine. These  
10 transmitted messages are not unsolicited “material advertising the  
11 commercial availability or quality of any property, goods or services”  
12 within the ordinary meaning of those words of the Act.

9 *Id.* at 181-82.

10           Myriad other courts have come to the identical conclusion regarding employment-related  
11 outreach in the TCPA context. *See, e.g., Salmon v. CRST Expedited, Inc.*, No. 14-CV-0265-CVE-  
12 TLW, 2015 WL 1395237, at \*4 (N.D. Okla. Mar. 25, 2015) (“Courts have found that a company’s  
13 message concerning a possible offer of employment does not constitute telemarketing or an  
14 unsolicited advertisement, because no goods or services are being offered for sale by the caller”  
15 and reaching the same conclusion); *Gerrard v. Acara Sols. Inc.*, 469 F. Supp. 3d 96, 99 (W.D.N.Y.  
16 2020) (“The text messages described in the Complaint merely reference an employment  
17 opportunity” and therefore are not advertisements or telemarketing); *cf. Murphy*, 2013 WL  
18 6865772, at \*10 (M.D. Fla. Dec. 31, 2013) (holding that blood donation solicitation messages were  
19 not telephone solicitations under the TCPA); *see also Alleman v. Yellowbook*, No. 12-CV-1300-  
20 DRH-PMF, 2013 WL 4782217, at \*6 (S.D. Ill. Sept. 6, 2013) (finding that a call to confirm the  
21 delivery of a Yellowbook was neither an advertisement nor a solicitation because “[t]he call  
22 contains no inclination that it is motivated in part by the desire to ultimately sell additional goods  
23 or services . . . either during the call, or in the future.”).

24           Plaintiff alleges the calls at issue pertained exclusively to recruiting him for employment.  
25 The calls discussed the benefits of working for DoorDash, the flexibility and the potential wage.  
26 (See Dkt. 1 ¶¶ 25, 37.) Plaintiff’s conclusory attempt to portray these calls as “telemarketing calls”  
27 that were “soliciting Plaintiff to work for DoorDash *and/or use its services*,” (*see id.* ¶¶ 24, 57,

emphasis added), are undercut directly by Plaintiff’s own specific allegations regarding the content of the calls. *See Dolemba*, 2015 WL 4727331, at \*1 (disregarding “complaint’s artful drafting” to focus on the specific factual allegations made as to the content of the call). Plaintiff even begins his allegations by arguing DoorDash needs to recruit more delivery drivers due to the pandemic. (*See id.* ¶ 20.) As Plaintiff alleges, these calls thus do not advertise the commercial availability of any products or services, nor do they encourage the purchase or investment in products or services. Plaintiff cannot avoid his own allegations through use of conclusory buzzwords. *See, e.g., Carson Optical Inc. v. eBay Inc.*, 202 F. Supp. 3d 247, 255 (E.D.N.Y. 2016) (“[S]pecific allegations that directly contradict general allegations will generally control.”); *Perlman v. Zell*, 938 F. Supp. 1327, 1347 (N.D. Ill. 1996), *aff’d*, 185 F.3d 850 (7th Cir. 1999) (“In the event of a conflict, specific factual allegations control over general allegations that state legal elements, and if a plaintiff pleads particulars that show he has no claim, then he has pleaded himself out of court.”).

The calls at issue contrast directly with the calls at hand in *Chesbro*, the Ninth Circuit’s seminal case on this very issue. *See Chesbro*, 705 F.3d at 913. *Chesbro* involved a putative TCPA class action stemming from automated calls from Best Buy to a plaintiff on the national do not call list who had requested that the calls stop. *See id.* at 916. The calls concerned Best Buy’s Reward Zone program and notified the plaintiff that his “Reward Zone” certificates were going to expire if not used by a certain date and of changes to the Reward Zone program. *Id.* at 916-17. The Ninth Circuit determined that the calls were advertisements or telemarketing because:

We approach the problem with a measure of common sense. The robot-calls urged the listener to “redeem” his Reward Zone points, directed him to a website where he could further engage with the [Reward Zone Program], and thanked him for “shopping at Best Buy.” *Redeeming Reward Zone points required going to a Best Buy store and making further purchases of Best Buy’s goods.* There was no other use for the Reward Zone points. *Thus, the calls encouraged the listener to make future purchases at Best Buy.*

*Id.* at 918 (emphasis added). Though there was an informational component to the call, the purpose at the end of the day was to encourage purchases. No such purpose exists for the calls at issue as Plaintiff alleges. The sole purpose was employment.



Plaintiff provides not a single factual allegation to suggest the calls at issue pertained to anything other than employment. Plaintiff's own allegations foreclose his claim. *See Reardon*, 115 F. Supp. 3d at 1096 ("[T]he texts sent to prospective drivers in this case do not promote goods or services and are not advertisements or telemarketing efforts."). Viewing the calls "with a measure of common sense," Plaintiff alleges solely the receipt of employment opportunity calls. Plaintiff's claim under 47 U.S.C. § 227(b)(1)(B) should thus be dismissed with prejudice. *See also Salmon*, 2015 WL 1395237, at \*5 (distinguishing the outcome in *Chesbro*, holding "[t]he call merely advises a person that CRST is looking to hire new drivers . . ."). Plaintiff has, by his affirmative allegations, pleaded himself out of court. No amendment could cure these defects and change the nature of the calls at issue.

***iii. Job recruitment calls are not telephone solicitations under the TCPA and thus Plaintiff's claim under 47 U.S.C. § 227(c)(5) must be dismissed.***

Plaintiff's claim under 47 U.S.C. § 227(c)(5) is predicated on an alleged violation of the corresponding regulation, 47 C.F.R. § 64.1200(c)(2), which prohibits the placement of "telephone solicitations" to residential numbers on the national do not call list (with certain exceptions not pertinent at this stage of the case). *See* 47 C.F.R. § 64.1200(c)(2). A telephone solicitation is defined nearly identically as the term "telemarketing" to mean "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services . . . ." *Id.* § 64.1200(f)(15); *see also* 47 U.S.C. § 227(a)(4).

Plaintiff's claim under 47 U.S.C. § 227(c)(5) thus fails for the identical reason as his first claim—namely, Plaintiff did not, by his own allegations, receive any telephone solicitations. Given the similarities in definition between "telephone solicitation" and "telemarketing," *compare* 47 C.F.R. § 64.1200(f)(15) *with* 47 C.F.R. § 64.1200(f)(13), the *Reardon* analysis remains persuasive here. *See Reardon*, 115 F. Supp. 3d at 1097 ("Viewing Uber's relationship with its drivers in this light, the texts from Uber seeking to recruit drivers were not attempts to promote a 'good' (its application) to those drivers, but instead was an attempt to recruit drivers so that those potential drivers could provide services to riders.").

1 Likewise persuasive is the analysis in *Friedman* concerning job recruitment calls in the  
 2 context of the telephone solicitation definition. *See Friedman*, 2013 WL 4102201, at \*6. As noted  
 3 above, the call at issue in *Friedman* concerned an invitation to a job recruiting webinar. *Id.* at \*1.  
 4 The Court reviewed the definition of a “telephone solicitation” and stated that “[t]he Court must  
 5 determine whether the intent of the call is to offer property, goods, or services for sale during the  
 6 call or in the future.” *Id.* at \*6. Reviewing the purpose of the call and the allegations, the Court  
 7 held that “the messages were intended to inform Plaintiff of the opportunity to enter into an  
 8 independent contractor position with Defendant, and not to offer goods or services for sale.” *Id.*

9 Persuasive authority also abounds in other analogous contexts. In *Orea v. Nielsen Audio*,  
 10 Judge Spero evaluated whether market survey calls were telephone solicitations in the context of  
 11 a claim under 47 U.S.C. § 227(c)(5) predicated on alleged calls to a number on the do not call list.  
 12 *See No. 14-cv-04235*, 2015 WL 1885936, at \*1 (N.D. Cal. Apr. 24, 2015). The court first noted  
 13 that the calls did not encourage any purchase of goods or services. *Id.* at \*2 (“As alleged, they  
 14 only ask Plaintiff to participate in a TV and radio rating survey.”). The court next addressed the  
 15 argument that the calls were solicitations because Neilson was effectively “purchasing” the  
 16 plaintiff’s “labor and information,” and readily disregarded this argument as absurd in light of the  
 17 statutory definition’s requirement that the purchase be made “by the consumer, not by the caller.”  
 18 *Id.* at \*3. The court also found there were no allegations to suggest that the calls were an indirect  
 19 encouragement to purchase a product or service. *See id.* (“There is no allegation that Nielsen  
 20 encouraged Plaintiff to purchase its customers’ products or services during the call. Likewise,  
 21 there is no indication that Plaintiff’s survey responses will be used by Nielsen or its customers to  
 22 make a future sale to Plaintiff.”). The complaint was dismissed with prejudice. *Id.* at \*5.

23 In *Murphy v. DCI Biologicals*, a Middle District of Florida court evaluated a motion to  
 24 dismiss a claim predicated on an alleged violation of 47 C.F.R. § 64.1200(c) in the context of text  
 25 messages regarding blood plasma donation. *See* 2013 WL 6865772, at \*3. Though the messages  
 26 indicated payment for participating, the Court held that because “neither of the messages in this  
 27 case encouraged Murphy to purchase, rent, or invest in anything, they do not constitute ‘telephone  
 28

solicitations’ under the TCPA. On the contrary, one message asked Murphy to sell his blood to DCI Biologicals Orlando.” *Id.* at \*10; *see also Alleman*, 2013 WL 4782217, at \*6 (holding call not a solicitation because “[t]he call contains no inclination that it is motivated in part by the desire to ultimately sell additional goods or services . . . either during the call, or in the future.”).

Plaintiff makes no factual allegations to suggest that any of the calls were placed in whole or in part to encourage the purchase of any property, good or service, either now or sometime in the future. Instead, the factual allegations conclusively establish that the calls as alleged pertained to employment opportunities. (*See* Dkt. 1 ¶¶ 20, 25-38.) These calls are not solicitations as a matter of law, and Plaintiff’s conclusory reference to DoorDash’s “products and/or services,” (*see id.* ¶¶ 24, 57), do nothing to alter this conclusion. *See, e.g., Friedman*, 2013 WL 4102201, at \*6 (“The Court finds that Defendant’s messages also do not constitute telephone solicitations because the messages are not intended to encourage Plaintiff to engage in future commercial transactions with Defendant to purchase or invest in property, goods, or services.”).

The calls as Plaintiff alleges were solely employment recruitment calls. These calls are not telephone solicitations and thus Plaintiff cannot pursue a claim under 47 U.S.C. § 227(c)(5) for the alleged violation of 47 C.F.R. § 64.1200(c)(2). This claim should be dismissed with prejudice. As noted above, Plaintiff has pleaded himself out of court by affirmatively stating the content of the calls at issue. No amendment could cure this defect.

### CONCLUSION

For the reasons set forth above, DoorDash respectfully requests this Court: (i) dismiss the Complaint with prejudice; and (ii) award any other relief this Court deems equitable and just.

Dated: December 15, 2021

By: /s/ Mark S. Eisen

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